IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	ID No. 1810009281
v.	)	In and for Kent County
	)	
RICKY D. HARDY,	)	
	)	
Defendant.	)	

Submitted: August 22, 2019
Decided: September 18, 2019

ORDER

Defendant's Motion to Sever Charges
Denied.

Cari A. Chapman, Esquire and Lynn A. Kelly, Esquire, Department of Justice, Wilmington, Delaware; attorneys for the State.

Joseph A. Hurley, Esquire, Wilmington, Delaware, attorney for the Defendant.

WITHAM, R.J.

State v. Ricky D. Hardy
ID No. 1810009281
September 18, 2019

INTRODUCTION

Before the Court is Defendant, Ricky D. Hardy's, ("Defendant") Motion to Sever Charges. After considering the briefs and the record in its entirety, it appears to the Court that:

FACTUAL AND PROCEDURAL HISTORY

Following are the Facts as set forth in the Court's Order dated July 12, 2019:

1. On October 12, 2018, Defendant was attending a football game at Caesar Rodney High School located in Camden, Delaware.

2. During the game, a sixteen-year-old female, identified as M.C., and her mother notified a law enforcement officer that M.C. had been inappropriately touched on her buttocks in the concession line by a black male wearing a white hat, despite M.C.'s repeated commands to the individual to stop. M.C. also reported that she observed the black male take his hands out of his pockets and touch other girls standing in the concession line, after he had moved away from her position in line.

3. Based on her interaction with the individual and her observations, M.C. concluded that the inappropriate contact could not be accidental and decided to take a picture of the individual with her cellular telephone. Utilizing that photograph, law enforcement was able to locate Defendant, an African-American male, on the school grounds and confirm that he matched the individual in the photograph. Defendant was subsequently escorted off school property and barred from returning to the school.

4. After Defendant had departed, law enforcement received another report that a fourteen-year-old female, identified as S.V., was also touched inappropriately by a black male wearing a white hat. S.V. had also taken a picture of the individual that turned out to match Defendant's description.

5. As a result of M.C. and S.V.'s allegations, Defendant was charged with four counts of Unlawful Sexual Contact in the Second Degree, a felony, in violation of 11 *Del. C.* § 768.[1]

6. Defendant filed his Motion for Relief from Prejudicial Joinder of the four counts on April 1, 2019. The State's response was filed on June 26, 2019. Oral arguments were held on July 10, 2019 and the Court issued its decision from the bench, denying Defendant's motion.[2] The Court granted re-argument, and the parties filed briefs in support of their positions in accord with the Stipulation and Order for Briefing dated July 19, 2019. Defendant's "Omnibus" Brief in Support of Motion to Sever Charges (hereinafter "Defendant's Brief") was filed July 26, 2019, the State's Brief in Opposition of Severance (hereinafter "State's Brief") was filed August 13, 2019 and "Defendant's Reply Brief in Support of Severance and Exclusion of Other Bad Acts" (hereinafter "Defendant's Reply Brief") was filed August 22, 2019.

[1] *State v. Hardy*, Del. Super., ID No. 1810009281, DI 25.
[2] *See Id.*

THE PARTIES' CONTENTIONS

7. Defendant's Motion to Sever seeks to sever Counts 1 and 2 of the indictment related to the alleged incident involving M.C. from Counts 3 and 4 of the indictment related to the alleged incident involving S.V.[3] Defendant's contention, as outlined in his pleading, is as follows:

> [t]he presentation of these independent alleged acts, particularly involving sexual impropriety, is so unfairly prejudicial that a curative instruction telling the jury essentially, 'You should not consider the [D]efendant to be some type of pervert that takes advantage of teenage girls by grabbing their buttock.' and expect the jury, consisting of normal human beings, to put completely out of their minds the first incident when considering the second incident and vice versa notwithstanding any instruction that could be crafted mandating that they do so (sic).[4]

8. The State, in opposition, asserts that the circumstances surrounding the incident warrant the multiple charges being tried together and that Defendant's claim of prejudice, namely, that the jury will not be able to resist the cumulative nature of the two incidents, is baseless.[5]

9. In the Defendant's Brief, Defendant further argues that the joinder of the charges in this case does not promote judicial efficiency.[6] Defense also argues that

[3] D. Mot. for Relief from Prejudicial Joinder (hereinafter "D. Mot.") at 2.

[4] D. Mot. at ¶ 3.

[5] St. Reply at ¶¶ 10-11.

[6] D. Mot. at ¶ 4.

the introduction of the evidence of one of the acts in the trial for another similar act will result in prejudice to Defendant.[7] The State restates the argument that the similarities of the two acts warrant joinder under the circumstances.[8]

STANDARD OF REVIEW

10. Superior Court Rule of Criminal Procedure Rule 8(a) (hereinafter "Rule 8(a)"), permits joinder of two or more offenses in the same indictment if the offenses "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."[9] Pursuant to Superior Court Criminal Rule 14 (hereinafter "Rule 14"), the Court may grant severance if a defendant is prejudiced by the joinder.[10] It

[7] *Id.* at ¶ 10.

[8] *See* St. Reply.

[9] *See* Super. Ct. Crim. R. 8(a); *see also State v. Caulk*, No. 0001012941, 2006 WL 2194656, at *4 (Del. Super. July 28, 2006) (holding that it was proper to deny defendant's motion to sever offenses involving one victim from offenses involving another victim where the charges were of the same general character because each involved an assault with a dangerous instrument and took place within approximately fifteen (15) minutes and within a few blocks from each other); *State v. Strickland*, 2007 WL 949481, at *4 (Del. Super. Mar. 23, 2007) (denying motion to sever charges because the similarities between the six (6) incidents were sufficient evidence under D.R.E. 404(b) to demonstrate common scheme or plan).

[10] *See* Super. Ct. Crim. R. 14 ("If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney general to deliver to the court for inspection in camera any statements or confessions made by the defendants which the state intends to introduce in evidence at the trial.").

is Defendant's burden to demonstrate such prejudice, and hypothetical suggestions of prejudice resulting from joinder will not suffice.[11]

DISCUSSION

A. Prejudice

11. Delaware law recognizes three situations in which prejudice from joinder arises:

> (1) when the jury may cumulate evidence of the various crimes charged and find guilt when, if considered separately, it would not;
>
> (2) when the jury may use evidence of one of the crimes to infer general criminal disposition of a defendant in order to determine guilt of another crime or crimes;
>
> (3) when a defendant may be subject to embarrassment or confusion in presenting different and separate defenses to different charges.[12]

"[A] crucial factor to be considered in making a final determination on the motion should be whether the evidence of one crime would be admissible in the trial of other crimes."[13]

12. The mere fact that crimes for which Defendant was charged were separate in nature and committed against different individuals over a period of time does not

[11] *Ashley v. State*, 85 A.3d 81, 84-85 (Del. 2014) (citing *Skinner v. State*, 575 A.2d 1108, 1118 (Del.1990)).

[12] *Id.* (citing *Wiest v. State*, 542 A.2d 1193, 1195 (Del.1988)).

[13] *West*, 542 A.2d at 1196 n. 3.

necessarily require severance.[14] Indeed, severance has been denied in cases where the offenses charged are of the same general nature and demonstrate evidence of a similar modus operandi, even though obvious prejudice to the defendant was present.[15] On the other hand, severance should be granted if and when the sheer mass of charges renders it extremely unlikely that a jury will be able to resist the cumulative effect of evidence linking a defendant to separate charges.[16] This is a delicate balance that the Court must maintain.[17]

13. When the evidence of other offenses is isolated and removed in time from the offense Defendant is charged with, such prior offenses will not be considered a part of a common scheme.[18] In this case, however, Defendant committed two offenses as a part of one occurrence. In this case, the Court finds Defendant's alleged acts are based on the same act or transaction. This is demonstrated by the proximity of the alleged contact coupled with the small lapse of time between the

[14] *Ashley*, 85 A.3d at 84-85.

[15] *State v. Waters*, Nos. 1101006766, 1105019914, 2011 WL 5330650, at *1 (Del. Super. Oct. 4, 2011) (citing *State v. McKay*, 382 A.2d 260, 262 (Del. 1969)).

[16] *Id.*

[17] *Ashley*, 85 A.3d at 85 (citing *Mayer v. State*, 320 A.2d 713, 717 (Del.1974) (Court must balance a defendant's rights against that of judicial economy)).

[18] *State v. Getz*, 538 A.2d 726 (Del. 1988) (evidence of prior sexual contact involved two other isolated events within the previous two years depicting no common plan other than multiple instances of sexual gratification, which, despite repetition, is not, in itself, evidence of a plan, and other crimes of the sort with which he is charged cannot be admitted against the defendant under that guise).

alleged acts upon M.C. and S.V. As the record reflects, all charged acts allegedly occurred while the victims were standing in the same concession stand line during the same football game.[19] Furthermore, the time that elapsed between Defendant's contact with M.C. and S.V. was 30 minutes or less.

14. Additionally, the Court finds the nature of Defendant's alleged inappropriate behavior, i.e., Defendant touching M.C. and S.V.'s buttocks while standing in a crowded queue, demonstrates a similar modus operandi in order to avoid detection or have plausible excuse. Accordingly, it cannot be said that these charges were not "based on the same act or transaction" due to the type and time in which the alleged acts occurred. This case appears to fit the scenario for which Rule 8(a) was designed. The fact that both offenses involve allegations of sexual misconduct does not necessarily result in prejudice that requires severance in this case.[20] Furthermore, Defendant is not exposed to potential embarrassment or confusion in presenting different defenses because his defense is the same for both offenses – he denies the accusations entirely.

15. Additionally, the purpose of Rule 8 (to promote judicial economy) is served when the two cases have same *factual and legal* bases. Here, the two offenses are very similar, and, therefore, enough overlap exists to justify joining them in the

[19] *See* TR Preliminary Hearing at 14:18-19; 21, *State v. Hardy*, ID 1810009281 (Del. Com. Pl. Nov. 9, 2018).

[20] *See State v. Goldstein*, No. 990423159, 2000 WL 33113953 (Del. Super. Dec. 21, 2000) (court denied severance when several acts of sexual misconduct were involved, the acts occurred within weeks of each other, and the acts were determined to be a part of a common plan).

interests of judicial economy, including the fact that the same witness or witnesses are likely to testify in both cases.[21] Defendant asserts that only two short trials are necessary, but fails to take into consideration the expenses and inconvenience for witnesses and delay resulting from two separate jury selection processes.

B. Rule 404

16. The evidence of Defendant's offense against one victim would also be admissible in the trial for the offense against the other victim in this case. Under Delaware Rule of Evidence 404(b) character evidence is inadmissible to prove propensity, but is admissible for other reasons, including "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[22] The factors to consider when deciding whether the evidence is admissible under D.R.E. 404(b) are:

(1) whether the evidence is material to an issue or ultimate fact in dispute;

(2) whether it is introduced for the purpose sanctioned by Rule 404 or other purpose not inconsistent with general prohibition of evidence of bad character or criminal disposition;

(3) whether the other crimes can be proven by clear, plain, and conclusive evidence;

[21] *See State v. Siple*, Nos. IN94-12-1641 to IN94-12-1672, 1996 WL 528396 at *2-3 (Del. Super. July 19, 1996) (discussing factors to be taken in consideration when determining whether judicial economy is served)

[22] D.R.E. 404(b).

(4) whether the other crimes are too remote in time from the charged offense:

(5) whether the evidence's probative value is substantially outweigh its prejudicial effect.[23]

17. In this case, it appears that the *Getz* test is satisfied. The evidence, which is material to the dispute, could be introduced to prove the absence of mistake, or, in the alternative, opportunity and/or plan. Both testimonies offered at the same trial can demonstrate the absence of mistake. Offering these testimonies together can also demonstrate a common plan to make sexual contact with minors standing in line.

18. The fact that Defendant had a common plan can be inferred from the testimonies based on the similarity in the way he touched two victims: both victims were standing in line, he was close to both of them, and he apologized to both of them after the first touch. Therefore, the evidence would be introduced for a proper purpose. The evidence of other crimes sought to be admitted is clear, concise and convincing.[24] The evidence of one alleged offense is not too remote in time from the other one, as discussed above and as conceded by defendant. To balance the probative value of the evidence against its prejudice the Court must consider several factors:

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[23] *Getz*, 538 A.2d at 734.

[24] Defendant does not challenge this proposition.

(1) the extent to which the point to be proven is disputed;

(2) the adequacy of proof of the prior conduct;

(3) the probative force of the evidence;

(4) the proponent's need for the evidence;

(5) the availability of less prejudicial proof;

(6) the inflammatory effect of the evidence;

(7) the similarity of the prior wrong to the charged offense;

(8) the effectiveness of limiting instructions;

(9) the extent to which prior acts evidence would prolong the proceedings.[25]

19. In this case, some prejudicial effect is present based on the nature of the allegation, but the potential bolstering effect must be balanced against the other factors. Here, the evidence is related to a disputed point (whether the inappropriate conduct occurred at all), it has a high probative value of demonstrating the lack of mistake or common plan, and the introduction of this evidence does not prolong judicial proceedings. Defendant in this case fails to address the State's need for this evidence on the issues of absence of mistake and/or common plan. The evidence of prior act is, furthermore, very similar to the charged offense, as discussed above.

20. Defendant provides the Court with a notion that it would be impossible for a jury to separate the incidents involving M.C. and S.V. and not consider them together even if the Court provides limiting instructions.[26] Delaware case law teaches

[25] *Deshields v. State*, 706 A.2d 502, 506-07 (Del. 1998).

[26] *See* Defendant's Brief at ¶ 29.

us that juries are more than capable of such a feat. For example, in *Ashley v. State*, the Court gave a limiting instruction not to accumulate evidence presented regarding three separate charges that the defendant faced.[27] The *Ashley* jury actually acquitted the defendant of several charges. The jury's actions were further noted by the Delaware Supreme Court as clear evidence that a jury was capable of, and actually followed, the Court's limiting instruction.[28]

21. If necessary, the Court will permit counsel to submit an agreed-upon limiting jury instructions.

CONCLUSION

Therefore, for the reasons stated above, the Court hereby **DENIES** Defendant's Motion to Sever the charges of his indictment. The matter is still set for trial as scheduled.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLWJr./dsc
oc: Prothonotary
cc: Cari A. Chapman, Esquire
Lynn A. Kelly, Esquire
Joseph A. Hurley, Esquire

[27] *Ashley*, 85 A.3d at 85.
[28] *Id.*